

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PICKERING

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by undermining the presumption of innocence during his closing argument.
2. The prosecutor committed misconduct by incorrectly describing the reasonable doubt standard to the jury.
3. The prosecutor committed misconduct by equating the reasonable doubt standard to everyday decisionmaking and conclusions reached through common sense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal defendants enjoy a presumption of innocence that the State must overcome in order to convict by proving each element of a charged offense beyond a reasonable doubt. Did the prosecutor in this case violate Mr. Pickering's constitutional right to a presumption of innocence when he repeatedly made comments indicating that the jury could permissibly begin with a belief that Mr. Pickering was guilty, and convict him if the trial and subsequent deliberations did not change that belief? (Assignment of Error 1.)

2. Did the prosecutor violate Mr. Pickering's constitutional right to a fair trial when he described the reasonable doubt standard in

terms that made it the functional equivalent of the preponderance of the evidence standard? (Assignment of Error 2.)

3. Did the prosecutor violate Mr. Pickering's constitutional right to a fair trial when he described the reasonable doubt standard in terms of everyday decisionmaking and conflated reasonable doubt with the exercise of common sense? (Assignment of Error 3.)

4. May Mr. Pickering raise these issues for the first time on appeal? (Assignments of Error 1-3.)

STATEMENT OF THE CASE

At about 7:00 on the morning of May 9, 2010, an employee of the Ocean Market and Gas in Ocean City, Grays Harbor County, came to work to find that somebody had broken into the store. Verbatim Report of Proceedings, Oct. 11, 2010 (RP) 9-10, 17-18, 27. She called the police, who upon arriving at the scene observed obvious damage and disarray inside the store. RP 18.

The responding officer observed that an air-conditioning fan had been torn from the outer wall and was the apparent point of entry for the burglary. RP 18-19. He also noticed some blood on the floor behind the front counter and collected a sample of the blood for DNA analysis. RP 23-26. The officer also obtained a security video of the incident from the store's owner. RP 28.

After a crime lab matched the DNA found at the scene with Mr. Pickering's DNA profile from a database, the State charged him with one count of second-degree burglary. CP Sub no. 28 at 1; CP Sub no. 1 at 1. At trial, the State presented the testimony of the employee who discovered the break-in, as well as the police officer who responded to the scene. The State subpoenaed the store owner, but he did not appear and the State did not present any testimony from him. RP 30-33.

The employee testified that while the store was typically swept and mopped every night, RP 11, she had left work the day before at about noon, RP 34, 36, and therefore could not personally verify that the store had actually been cleaned that night prior to closing. The officer testified that the security video he had viewed showed a person crawling in the area where he found the blood, but that the person's face was covered, precluding any identification based on the video footage. RP 28. He did not testify to whether the video had any timestamp on it, and neither party offered the actual video into evidence. Both the employee and the police officer testified that the blood on the floor appeared fresh. RP 11, 29-30. Mr. Pickering stipulated that the DNA found at the scene matched his DNA with an estimated random-match probability of one in 1.7 quadrillion. RP 36.

After both sides had rested, the court delivered the jury instructions. RP 45. These included pattern instructions addressing the burden of proof, the presumption of innocence, the definition of reasonable doubt, and the use of circumstantial evidence. CP Sub no. 35 at 3-4; 11 Washington Practice, Pattern Jury Instructions: Criminal (WPIC) 4.01 (3d ed.); WPIC 5.01. The court's reasonable doubt instruction included the optional final sentence from WPIC 4.01, which reads: "If, [after fully, fairly, and carefully considering all of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP Sub no. 35 at 3-4; WPIC 4.01.

During his closing argument, the prosecutor attempted to explain these instructions to the jury. He claimed that while "reasonable doubt" is "not something that you normally use in your everyday life," the "abiding belief" language is "an idea that people deal with everyday. It's what do you believe. You know how strongly you hold your beliefs." RP 49. He then told the jury that if, after the trial and deliberation process, the jurors believed that Mr. Pickering was guilty, they had an abiding belief sufficient to convict. RP 49-50. He also described the concept of reasonable doubt several times as a doubt that would cause a person to question a pre-existing belief. RP 49-51. Mr. Pickering's counsel did not

object to any of these statements. The jury found Mr. Pickering guilty as charged, CP Sub no. 36, and he now appeals that conviction.

SUMMARY OF THE ARGUMENT

The prosecutor in this case delivered a closing argument that violated Mr. Pickering's constitutional right to a fair trial. The prosecutor's description of the reasonable doubt standard indicated to the jurors that they could begin by presuming Mr. Pickering's guilt and vote to convict unless Mr. Pickering raised a reasonable doubt in their minds, and that the reasonable doubt standard was no more demanding than determining what happened based on the preponderance of the evidence. He also wove references to the reasonable doubt standard into a discussion of the proper use of circumstantial evidence, suggesting that the jury could properly convict Mr. Pickering based simply on a common-sense assessment of his guilt. These statements misrepresented the relevant constitutional standards and the jury's proper role, and they caused Mr. Pickering prejudice. The prosecutor thus violated Mr. Pickering's right to a fair trial, and this Court should vacate his conviction accordingly.

ARGUMENT

The prosecutor committed misconduct during his closing argument that deprived Mr. Pickering of his right to a fair trial.

- a. The prosecutor's argument violated Mr. Pickering's constitutional rights by shifting the burden of proof onto the defense.**

In a criminal trial, the State carries the burden of proving every element of the charged offenses beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). This burden exists because criminal defendants are always presumed to be innocent, unless and until the State proves otherwise. *Id.* at 363. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Thus, a criminal defendant has no burden to produce or prove anything as to the necessary elements of the charges against him, or otherwise to establish the existence of a reasonable doubt. *State v. Kroll*, 87 Wn.2d 829, 840, 558 P.2d 173 (1977) (citing *Winship*, 397 U.S. 358); *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008).

Prosecutors, as quasi-judicial officers, are tasked not only with obtaining convictions, but also with ensuring that defendants receive fair

trials. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is therefore misconduct for a prosecutor to undermine the presumption of innocence or to suggest a shift in the burden of proof during a criminal trial. *State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding that a prosecutor committed misconduct by stating that the defense attorney "would not have overlooked any opportunity to present admissible, helpful evidence"). Washington courts have repeatedly reversed convictions in cases where the prosecutors' closing arguments suggested that the defendants had any formal burden at trial, or mischaracterized the reasonable doubt standard either explicitly or implicitly. *E.g.*, *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), *rev. denied*, 171 Wn.2d 1013 (2011); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813, *rev. denied*, 170 Wn.2d 1003 (2010); *State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011).

These improper arguments have taken many forms, including comparing the reasonable doubt inquiry to everyday decisionmaking, subtly framing a not-guilty verdict as a positive act rather than the default choice, and arguing that in order to acquit, jurors must affirmatively provide a reason for doing so. *See, e.g.*, *Johnson*, 158 Wn. App. at 684-85, *State v. Anderson*, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009); *Venegas*, 155 Wn. App. at 523-25; *Walker*, 164 Wn. App. at 731-33.

As in those cases, the prosecutor here repeatedly made misleading statements to the jury that subverted the presumption of innocence and distorted the reasonable doubt standard.

i. The prosecutor suggested that jurors could presume guilt.

The prosecutor made several comments during his closing argument indicating that it would be proper for the jurors to begin their deliberations believing that Mr. Pickering was guilty, and to acquit only if the trial process caused them to question that belief. First, in his initial discussion of the reasonable doubt standard, the prosecutor described the concept of reasonable doubt as being a doubt that could make a juror question a belief that he or she already held. RP 49 ("I mean people can talk about doubts all of the time and then you look at him and say, well, that's not reasonable at all. I mean that doesn't make sense. Yeah, you just say that but that doesn't mean I have to lose faith in my – my belief.").

Later, in purporting to explain the "abiding belief" language contained in the jury instruction defining reasonable doubt, the prosecutor told the jury that its role was to listen to the evidence, and "then you go and deliberate and you talk amongst each other that tests your belief and in the end [if] your belief survives this whole process, it's an abiding belief." RP 50. Once again, this statement suggested that the purpose of the trial

was to test a preexisting belief in Mr. Pickering's guilt, rather than to determine whether the State had proved each element of the charge beyond a reasonable doubt.

The prosecutor then closed his remarks by giving an example of a person waking up to find a fresh layer of snow on the ground, and again discussed the reasonable doubt standard:

Somebody said, well, you don't know, maybe somebody took a snow machine and covered the country side with it. But you know that's just not practical *and it doesn't raise a reasonable doubt in your mind about where the snow came from*. So in this case if you trust in your belief and use your common sense you will come to the conclusion that the defendant is, in fact, guilty. Thank you.

RP 51-52 (emphasis added).

These comments repeatedly suggested to the jurors that they could begin with a belief in Mr. Pickering's guilt, and that if the trial failed to change that belief, or if Mr. Pickering failed to create a reasonable doubt as to his guilt, then they should return a guilty verdict. But the jury's proper role is to begin with a presumption of innocence, and only to return a guilty verdict if the State proves each element of the crime beyond a reasonable doubt. *E.g., Kroll*, 87 Wn.2d at 840; *Winship*, 397 U.S. at 364. The prosecutor's statements undermined this role by shifting the burden of proof onto Mr. Pickering. The prosecutor thus subverted Mr. Pickering's constitutionally guaranteed presumption of innocence.

ii. The prosecutor improperly lowered the burden of proof by misrepresenting the reasonable doubt standard and comparing it to everyday decisionmaking and common-sense determinations.

The prosecutor also misrepresented the reasonable doubt standard and trivialized the jury's responsibility by comparing the jurors' deliberations to everyday decisionmaking. He began properly, noting that the reasonable doubt standard is not something that people apply in day-to-day life. RP 49. But he then immediately framed the standard in terms of everyday decisions by purporting to explain the meaning of the term "abiding belief"—which, as used in the relevant jury instruction and as described by the prosecutor, is a direct proxy for "beyond a reasonable doubt." *See* CP Sub no. 35 at 3-4; RP 49 ("[I]f I have proven to you to an abiding belief that the defendant is guilty, I have proven to you beyond a reasonable doubt.").

During his closing argument, the prosecutor asserted that an "abiding belief," as used in the reasonable doubt instruction, is "an idea that people deal with everyday. It's what do you believe. You know how strongly you hold your beliefs." RP 49. But "what do you believe" is not an accurate statement of the standard by which a jury properly judges a criminal defendant. A jury may well believe—perhaps even unanimously—that a defendant probably committed a crime, but its duty

is still to acquit unless the State has proven each element of the charge beyond a reasonable doubt. *Anderson*, 153 Wn. App. at 429 ("A jury's job is not to 'solve' a case . . . [or] to declare what happened on the day in question. Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.") (quotation omitted). The "what do you believe" test, on the other hand, effectively describes not the reasonable doubt standard, but the much lower preponderance of the evidence standard imposed on most civil plaintiffs.

The prosecutor continued in this vein, telling the jurors that the purpose of the trial and deliberation was to "test your belief in my evidence," and that if "in the end your belief survives this whole process, it's an abiding belief." RP 50. These statements not only indicated to the jury that it could begin with a presumption of guilt, as noted above, but also reiterated the incorrect preponderance of the evidence standard. The prosecutor made these claims repeatedly, devoting a significant portion of his closing argument to them. In doing so, he lowered the State's burden of proof and violated Mr. Pickering's constitutional rights.

The prosecutor committed further misconduct by conflating the State's burden of proof with the exercise of the jury's common sense. After his "abiding belief" argument, the prosecutor undertook to explain the

difference between direct and circumstantial evidence by way of an analogy to a person waking up to find snow blanketing his neighborhood. RP 50-52. The prosecutor explained that the snow on the ground was only circumstantial evidence that the snow had fallen from the sky. RP 51. He then explained how, based on common sense, even that purely circumstantial evidence would legitimately lead one to believe that it had snowed, and not that somebody had covered everything in sight with a snow machine. RP 51.

This discussion would not have been objectionable, except that the prosecutor repeatedly mixed in references to reasonable doubt in the analogy:

Now, it can be argued, you didn't see that with your own eyes, you did not see it snow, therefore you cannot know beyond a reasonable doubt or to any certainty that it did snow last night, but you know that's not true. Why? Because you have common sense. . . . Somebody said, well, you don't know, maybe somebody took a snow machine and covered the country side with it. But you know that's just not practical and it doesn't raise a reasonable doubt in your mind about where the snow came from.

RP 51.

These interjections as to reasonable doubt conflated the legitimacy of circumstantial evidence, which is based on common sense, with the State's burden of proof, which is not. The comments were particularly damaging when considered in context. Directly following his discussion of

circumstantial evidence and common sense, the prosecutor concluded his argument by telling the jury, "[s]o in this case if you trust in your belief and use your common sense you will come to the conclusion that the defendant is, in fact, guilty. Thank you." RP 51-52. That summation delivered a clear message: if the jurors' common sense told them that Mr. Pickering had committed the crime—just as their common sense would tell them upon waking up to find snow on the ground that it had snowed overnight—then they should vote to convict.

Once again, the prosecutor's message to the jury was not an accurate statement of the law. The jurors were certainly entitled to use their common sense to evaluate the evidence, and even to determine that Mr. Pickering had probably committed the crime. But they were not entitled to proceed directly from that determination to a guilty verdict, without independently assessing whether the State had proved each element of the crime beyond a reasonable doubt. *See Anderson*, 153 Wn. App. at 429 (noting that the jury's job is not to decide what actually happened, but to determine whether the State has met its burden of proof). The prosecutor's repeated insinuations to the contrary—especially when considered along with his earlier distortions of the presumption of innocence and "abiding belief" language—violated Mr. Pickering's constitutional right to a fair trial.

b. Mr. Pickering suffered prejudice as a result of the prosecutor's misconduct.

Prosecutorial misconduct does not inherently justify overturning a conviction. *Walker*, 164 Wn. App. at 730. Rather, the misconduct must cause some prejudice to the defendant. *Id.* (citing *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). A court must "review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *State v. Evans*, 163 Wn. App. 635, 642, 260 P.3d 934 (2011) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Where a prosecutor commits misconduct but does not violate the defendant's constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *See, e.g., State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (placing burden of proving prejudice on defendant where prosecutor committed misconduct by violating evidentiary ruling); *State v. Jones*, 144 Wn. App. 284, 300, 183 P.3d 307 (2008) (placing burden of proving prejudice on defendant where prosecutor committed misconduct by bolstering witness's credibility and arguing facts not in evidence); *State v. Echevarria*, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993) (placing burden of proving

prejudice on defendant where prosecutor committed misconduct by inflaming the passions of the jury).

Where a prosecutor violates a defendant's constitutional rights, however, the State bears the burden of proving beyond a reasonable doubt that the misconduct did not contribute to the verdict. *See, e.g., Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (requiring State to prove harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); *Monday*, 171 Wn.2d at 680 (requiring State to prove harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping, violating constitutional right to impartial jury); *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (requiring State to prove harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to represent himself).

- i. Because the prosecutor's closing argument shifted the burden of proof onto the defense, this Court should apply the constitutional harmless error standard.**

The Fourteenth Amendment guarantees the twin rights to presumption of innocence and proof beyond a reasonable doubt. U.S. Const. amend. XIV; *Cool v. United States*, 409 U.S. 100, 104, 93 S. Ct.

354, 34 L. Ed. 2d 335 (1972) (presumption of innocence); *Winship*, 397 U.S. at 364 (burden of proof). These rights form the bedrock of our criminal justice system. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Thus, a jury instruction that incorrectly describes the reasonable doubt standard is one of the few errors subject to automatic reversal without any showing of prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). It is the type of error which "infect[s] the entire trial process, and necessarily render[s] a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).¹

A prosecutor's misrepresentation of the court's reasonable doubt instruction, as occurred here, is an even more insidious violation, and if not structural error subject to automatic reversal, must at least trigger the constitutional harmless error standard. The prosecutor in this case misinformed the jury not only as to the meaning of reasonable doubt, but as to the meaning of the court's instruction defining reasonable doubt. This misconduct placed the imprimatur both of the State *and* of the judiciary on

¹ And when a jury instruction lowers the prosecution's burden of proof as to a single element of the crime, the constitutional harmless error standard applies. The State must prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Neder*, 527 U.S. at 15; *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005); *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996); *State v. McCullum*, 98 Wn.2d 484, 498, 656 P.2d 1064 (1983), *abrogated by State v. Camara*, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989). Furthermore, the error may be raised for the first time on appeal. *Mills*, 154 Wn.2d at 6; *Deal*, 128 Wn.2d at 698; *McCullum*, 98 Wn.2d at 487-88.

the erroneous description of reasonable doubt. *See Evans*, 163 Wn. App. at 646 ("The prosecutor's arguments in closing cleverly mixed requests for the jury to 'hold me to the burden of proof exactly' with subtle twists of the jury's role and the State's burden of proof.").

Framing the misleading statements as an explanation of the court's instruction, rather than as an independent argument, also destroyed any mitigating effect that the properly given jury instruction, or a corrective admonition from the court, might have had. Juries may well be presumed to follow the trial court's instructions. *See Walker*, 164 Wn. App. at 737 (citing *Anderson*, 153 Wn. App. at 432). But reliance on a court's proper instruction cannot correct the error when a prosecutor "explains" that very instruction in a way that vitiates its intended effect.

Division One of this Court has previously applied the constitutional harmless error standard where a prosecutor made comments that placed the onus on the defendant to produce evidence to explain away incriminating circumstances. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995). The Court recognized that when the prosecutor "commented on [the defendant's] decision not to testify and shifted the burden of proof to the defense," he committed constitutional error. *Id.* The Court thus required the State to prove beyond a reasonable doubt that the error was harmless. *Id.* at 729.

"[T]he presumption of innocence is simply too fundamental, to central to the core of the foundation of our justice system" not to apply the constitutional harmless error standard when the State subverts it. *Bennett*, 161 Wn.2d at 317-18. Because the prosecutor in this case undermined the presumption of innocence and misled the jury as to the meaning of reasonable doubt, the State must prove beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict.

ii. The State cannot prove beyond a reasonable doubt that the misconduct did not contribute to the jury's verdict.

The constitutional harmless error standard places the burden on the State to prove the lack of prejudice beyond a reasonable doubt. In this case, it cannot do that. Even though the State presented evidence at trial that Mr. Pickering's DNA was found at the store, it did *not* present any evidence as to what time the break-in occurred or what happened at the store during the approximately 19 hours before the break-in was discovered. It did not offer any evidence to establish that Mr. Pickering had not been in the store as a legitimate customer the evening before the burglary, or that the floor had been cleaned before the store closed that night. And the video recording of the break-in did not reveal the identity of the burglar. RP 28.

Under these circumstances, the burden of proof and the presumption of innocence mattered. It is certainly plausible that the jurors might have found Mr. Pickering guilty by thinking that they could start with a belief in his guilt and convict him if the trial failed to disabuse them of that belief, but would have acquitted if they properly understood the presumption of innocence and the actual burden of proof. This Court has also held that prosecution arguments encouraging the jury to determine the truth of what happened, rather than to hold the State to its proper burden of proof, are particularly damaging when the jury hears only from State witnesses, as occurred here. *Evans*, 163 Wn. App. at 644. Thus, the prosecutor's misconduct was not harmless beyond a reasonable doubt, and Mr. Pickering's conviction must be vacated.

c. Mr. Pickering is entitled to raise this argument for the first time on appeal.

In general, a defendant must object to prosecutorial misconduct as it occurs in order to preserve the issue for appeal. *Walker*, 164 Wn. App. at 730. However, if "the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction," the issue may be raised for the first time on appeal. *Id.* (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Additionally, the Rules of Appellate Procedure permit a defendant to raise

an error for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The misconduct at issue here satisfies both of those standards.

i. The prosecutor's misconduct was flagrant and ill-intentioned.

The misconduct in this case involved statements made during the prosecutor's closing argument that shifted the burden of proof onto the defense and misrepresented the reasonable doubt standard. Washington courts have held repeatedly that such arguments are improper. *See, e.g., Johnson*, 158 Wn. App. at 684-85, *Anderson*, 153 Wn. App. at 431-32; *Venegas*, 155 Wn. App. at 523-25; *Walker*, 164 Wn. App. at 731-33. And the Court of Appeals has held that continuing to employ such arguments even after they have been repudiated by appellate courts evinces flagrant and ill-intentioned misconduct. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); *see also Anderson*, 153 Wn. App. at 433-34 (Quinn-Brintnall, J., concurring in the result); *but see State v. Emery*, 161 Wn. App. 172, 195-96, 253 P.3d 413, *rev. granted*, 172 Wn.2d 1014 (2011).

Moreover, the prejudice caused by the misconduct in this case could not have been cured by a corrective instruction from the court. For example, admonishing the jury that counsel's arguments are not evidence

and that it should closely examine and follow the court's instructions would not have done any good, because the prosecutor was telling the jury how they should interpret those very instructions. *Compare Warren*, 165 Wn.2d at 25. For the same reason, a simple restatement of the proper standard as described in the instruction would have been fruitless. And if the Court had attempted to add to or further explain the pattern instruction in order to remedy the prosecutor's misstatement of the law, it would have risked running afoul of the Washington Supreme Court's command not to depart from the pattern instruction on reasonable doubt. *See State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009) (holding that it is reversible error to use any reasonable doubt instruction other than that contained in the Washington Pattern Jury Instructions) (citing *Bennett*, 161 Wn.2d at 318).

The prosecutor's misconduct in this case was thus flagrant and ill-intentioned, causing prejudice that could not have been cured by a corrective instruction. Mr. Pickering is therefore entitled to raise the issue for the first time on appeal.

ii. Lowering the reasonable doubt standard and shifting the burden of proof onto the defense is a manifest error affecting a constitutional right.

Even had the misconduct here not met the "flagrant and ill-intentioned" standard, Mr. Pickering would have the right to raise the issue for the first time on appeal, because shifting the burden of proof and lowering the reasonable doubt standard is a "manifest error affecting a constitutional right," RAP 2.5(a)(3). Division One of this Court has formulated a useful four-step framework for applying this standard:

[T]he reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The first step—"a cursory determination as to whether the alleged error in fact suggests a constitutional issue"—is easily met here. The reasonable doubt standard and the presumption of innocence are unquestionably matters of constitutional import. *See, e.g., Kroll*, 87 Wn.2d at 840; *Warren*, 165 Wn.2d at 26-27. The third and fourth steps—the

merits of the challenge and harmless error—are addressed in parts (a) and (b) of this brief, respectively.

The error in this case also satisfies the second step of the *Lynn* test: it was "manifest" under the meaning of RAP 2.5(a)(3). The *Lynn* court interpreted the word "manifest" in RAP 2.5(a)(3) according to its ordinary usage, meaning "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." 67 Wn. App. at 345 (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The court further interpreted the term "affecting" as "having an impact or impinging on, in short, [making] a difference." *Id.*

The court held that these terms laid out a limiting principle to distinguish errors for which an appellant can make "some reasonable showing of a likelihood of actual prejudice," *id.* at 346, from "purely formal and obscure claims of constitutional error," *id.* at 344 n.3, or errors that were "purely abstract and theoretical . . . [and without] practical consequences," *id.* at 346. Thus, under *Lynn*, showing a "manifest" error does not require an appellant to establish that the error actually affected the jury's verdict. Indeed, if that were the case, the further inclusion of a harmless error analysis would be entirely redundant. Rather, an appellant needs only to make "some reasonable showing of a likelihood of actual prejudice." *Id.* at 346. The asserted error, in other words, must have been

plausibly capable of causing prejudice, not simply a hypertechnical objection or pie-in-the-sky theory that, in the context of the case, could not actually have affected the defendant's rights. *Id.*

The misconduct in this case meets that standard. First, the error was "manifest," in that it clearly appears on the face of the record. This is not a case where, for example, the objection is based on a failure to force a witness to invoke his Fifth Amendment rights to establish his unavailability, when it was all but certain that the witness would have done so if he had actually been forced to appear in court. *Compare id.* at 342, 346. Instead, the error here occurred during the prosecutor's closing argument; his misconduct appears on the record, the jury unquestionably heard it, and analyzing his statements requires no speculation.

Second, the error plausibly could have impacted Mr. Pickering's right to a fair trial. Importantly, the Washington Supreme Court has strongly suggested that shifting the burden of proof onto the defense is per se a manifest error affecting a constitutional right under RAP 2.5(a)(3). *See State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). And on the facts of this case, as noted above, the State did not establish the time of the burglary or what had happened for approximately 19 hours before the crime, including whether Mr. Pickering had been lawfully inside the store the day before or whether the floor had been cleaned prior to the break-in.

Given these gaps in the evidence, misinforming the jury as to the presumption of innocence and the meaning of "reasonable doubt" could well have affected its deliberations. The prosecutor's misconduct therefore affected Mr. Pickering's constitutional rights, as contemplated by *Lynn* and RAP 2.5(a)(3), and may be raised for the first time on appeal.

CONCLUSION

The prosecutor's closing argument undermined both the presumption of innocence and the proper application of the reasonable doubt standard. In making these statements, the prosecutor committed misconduct that prejudiced Mr. Pickering and violated his constitutional right to receive a fair trial. Because this misconduct was flagrant and ill-intentioned, and because it was also manifest error affecting a constitutional right, Mr. Pickering is entitled to raise this argument for the first time on appeal. He therefore asks this Court to consider his appeal on its merits and to vacate his conviction.

DATED this 30th day of April, 2012.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 42696-0-II
)	
MICHAEL PICKERING,)	
)	
APPELLANT.)	

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